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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1967

No. 573

WESTERN AIR LINES, INC., a corporation,

Respondent,

vs.

CATHERINE J. MICHUNOVICH, Treasurer of Yellowstone County, Montana; YELLOWSTONE COUNTY; and THE STATE BOARD OF EQUALIZATION OF THE STATE OF MONTANA,

Petitioners.

RESPONDENT'S BRIEF

Of Counsel:
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Attorney for Respondent.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

* * *

CONSTITUTIONAL PROVISIONS

Amendment XIV of the Constitution of the United States:

1. * * * nor shall any state deprive any person of life, liberty, or property, without due process of law, * * *

Article III of the Constitution of the State of Montana:

Sec. 27. No person shall be deprived of life, liberty, or property without due process of law.

ARGUMENT

GROUNDS WHY THE CAUSE SHOULD NOT BE REVIEWED BY THIS COURT

A. The Constitution of the State of Montana Supports the Judgment.

Respondent's Complaint charged that Petitioner by including in its assessment aircraft never used in air commerce in Montana deprived Respondent of its property without due process of law in violation of the Fourteenth Amendment of the United States Constitution and § 27 of Article III of the Constitution of Montana. [See Paragraph XIV, Section (10), page 7 of Complaint in Record (all page references to record use page number in original document considered by the State Court)].

The opinion of the Supreme Court of Montana specifically approved the unitary method of assessment based upon the concept of organic unity. However, the Court cautioned that certain constitutional requirements must be satisfied to prevent the unitary method from becoming an octopus which extends the taxing power of the state beyond its legal limit. (Appendix A to Petition for Writ of Certiorari, page 7). It concluded that the inclusion of jet aircraft values bearing only 0.50% passenger transfer values to the Montana operated aircraft results in excessive taxation. (Same: pages 7 and 8).

In *Wallace v. Hines*, 253 U.S. 66, 40 S. Ct. 435,

64 L. Ed. 782, this Court held that state taxation of property beyond its borders which did not add to the value of taxpayer's property and rights within the state was an unwarranted interference with interstate commerce and a taking of property without due process of law.

The Montana Constitution prohibits taking property without due process of law, and by itself fully supports the foregoing conclusions of the State Court. The United States Supreme Court decisions on due process are equally applicable to the almost identical provisions of the Montana Constitution.

Since the decision rests on an adequate state ground, the United States Supreme Court has no jurisdiction to review the same.

Jankovich v. Indiana Toll Road Commission, 379 U.S. 487, 85 S. Ct. 493, 13 L. Ed. 2nd 439.

See also *Department of Mental Hygiene of California v. Kirchner,* 380 U.S. 194, 85 S. Ct. 871, 13 L. Ed. 2nd 753.

B. The State Court's Decision is In Accord with Applicable Decisions of the United States Supreme Court.

The heart of the State Court's decision is the factual determination that there was a total lack of significant "organic unity" between the DC-6B operations, in Montana and elsewhere, and the rest of Respondent's system [Appendix A to Petition for Writ of Certiorari. Pages 2 and 7 and 8.] Therefore, the values of those jet aircraft used in the rest of Respondent's system were eliminated.

This result is supported by applicable decisions of this Court.

In *Wallace v. Hines,* 253 U.S. 66, 40 S. Ct. 435, 64 L. Ed. 782, it was held that property outside North Dakota which did not affect the value of the North Dakota part of the railroad should be eliminated in computing the North Dakota tax.

In *Southern Railway Company v. Kentucky,* 274 U.S. 76, 47 S. Ct. 542, 71 L. Ed. 934, this Court recognized that the state could take into consideration parts of the system outside the state operated in connection with the parts within it, but this Court stated that it is not permissible for the state to take into account any of the outside property unless it could be seen in a plain and intelligible way that it added to the value of the road and the rights exercised in the state.

To the same effect are the other decisions of this Court where similar questions have been presented.

CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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